I consider it my duty to punish severely any attempts to defraud the public revenue."

In my opinion the learned magistrate was wrong in considering that fines in Criminal cases are to be imposed as a source of Government revenue. Fines have nothing to do with the state of Government finances.

In Magna Carta c. 14 (which is law to-day in this Colony) it is provided that "*liber homo non amercietur pro parvo delicto nisi secundum modum ipsius delicti et pro magno delicto secundum magnitudinem delicti.*" It is the *magnitudo delicti* that is the fundamental test. I cannot at the moment quote actual case as authority in point, but I feel sure not only that it has been so decided but that in principle and apart from any decisions, what I have said is correct.

Fifthly, the learned magistrate has not, I think, appreciated the points that can properly be considered in determining the *quantum* of fine to be imposed. These are first, the profit arising from the offence; secondly the value of the subject matter of the offence; thirdly, the amount of the injury done; and fourthly, the financial position of the offender (Gour Vol. I, p. 345-6). Previous convictions or unusual prevalence of this particular type of crime might, if proved, be further grounds for enhancing the punishment by fine. But the fact that an offender has wealthy allies is not such a ground (Ratanlal 556 and Mayne 4th edition, page 28). The magistrate has not dealt with these details, though he may have had them in mind, but I have ascertained that the liquor stored was of about $100 in value; that the duty payable on it was $42; and that the appellant is an ordinary small Chinese shop-keeper. The profit accruing from the offence no doubt is large and would go a long way to counteract the appellant's status as a small shop-keeper. What his actual profit would be I do not know. The maximum punishment for a first offence (as this is) is $1,000 fine.

Sixthly, no order for the forfeiture of the liquor in this case appears to have been made, though an order is made for the forfeiture of the lorry. By section 83 of the Liquors' Revenue Ordinance 1927 it is provided that all liquor, the subject of an offence, together with any conveyance in which it is found may be seized by any revenue officer and shall be forfeited: so that if an order is necessary for the lorry an order is necessary for the liquor. The law seems to provide no immunity for an innocent carrier whose conveyance has once been seized by the revenue officer, and in this respect I think the law requires amendment. The law should, in my opinion, provide that forfeiture is a matter for the discretion of the Court.

Upon the whole I think it is clear that in imposing the sentence in this case the learned magistrate relied upon, at any rate, two grounds which are wrong, namely, the financial position of the Government and the unproved idea that the offence was part of a system.

How far these two elements affected his judgment it is difficult for me to say.

I confirm the conviction and reduce the sentence to a fine of $250 or in default six months' rigorous imprisonment. I, further, order the liquor to be forfeited to the Government under section 415 of the Criminal Procedure Code. As the fine has been paid the excess ($250) must be returned.

Conviction Confirmed—Sentence Reduced.

[APPELLATE CRIMINAL JURISDICTION]

PUBLIC PROSECUTOR .. .. Appellant.

vs.

LEE FOOK .. .. .. Respondent.

[SELANGOR MAGISTRATE'S CRIMINAL APPEAL No. 25 of 1932]

Where the dates on the face of the lottery tickets in the possession of a person subsequently accused, or the evidence of finding the lottery tickets, establishes beyond all doubt that the lottery has been drawn and concluded prior to the date of such finding, the presumption provided by section 8 (a) of the Common Gaming Houses Enactment, 1912, that a public lottery was in progress at the date of the finding, cannot arise.

Cussen, Deputy Legal Adviser, for Appellant.

Mallik for Respondent.

THORNE, AG. C.J.—This is an appeal by the Public Prosecutor against the decision of the learned First Magistrate, Kuala Lumpur, dismissing the charge against the respondent, of having assisted in the carrying on of a public lottery at Pudu on the 21st of May of this year.

The prosecution proved that a raid was conducted on the premises of the respondent on the 21st of May, and that in a house, which we will accept for the purpose of this appeal was then in his occupation, there were found a number of documents.

An expert witness was called to prove that these documents were such as would ordinarily be used in the running of a lottery known as the Tsz Fah lottery, and he proceeded to explain how such a lottery is conducted.

At the close of the case for the prosecution, the learned Magistrate expressed the opinion that the documents and all the testimony taken together did not establish against the respondent, either by direct evidence or as a result of the legal presumption, that an offence had been

committed by him on the 21st of May, and discharged the accused.

The Public Prosecutor has preferred this appeal against that decision, and seeks to establish that the view which the Magistrate took, and which he has set out in his very careful reasons for judgment, was a mistaken view of the law as applied to the facts of this case.

I am unable to accept the argument for the appellant, and I accept the view set out by the learned Magistrate.

As I understand the argument of the appellant, it is this. Under sub-section 8 (a) of the Common Gaming Houses Enactment No. 2 of 1926, the mere finding in the possession of an individual of some ten lottery tickets, or any of the several documents described in that section, suffices of itself to prove that the person so in possession is assisting in the conduct of a public lottery then in progress, and that such a finding raises a presumption under the Enactment, although a more complete examination of the tickets may disclose the fact that the lottery in which the tickets are held has been drawn and concluded long previously.

I wish to be careful to express no opinion whatever, except such as is essential to the decision of this appeal. It seems to me that, assuming an individual is found in possession of twenty tickets in a lottery, and those documents show that the lottery had been drawn a couple of years previous to the date of the find, these do not raise a presumption, under section 8 (a), of the fact that a lottery was then, at the time of finding, in progress. It seems to me that the evidence of the ticket itself would be sufficient to rebut any such presumption.

Again, the evidence of finding may affect the position. Supposing such a finding as I have suggested is of tickets which have been drawn and then thrown into a waste paper basket. It seems to me that, where the prosecution relies on the finding of lottery tickets, these may be undated in which case the presumption will arise under this section, or these may be dated in such a manner as to show that the lottery is to be drawn in future, in which case it may well be that the lottery will be shown to have been started and not to have concluded, and properly therefore to be in progress.

Equally it seems to me that the dates on the face of the tickets themselves may establish beyond all doubt that the lottery has been drawn and concluded and indeed forgotten. And it is contrary to good sense that in such circumstances such tickets as I have described, dated for example two years previously, can establish by means of a presumption, that a lottery is in progress at the date of the finding.

The learned Magistrate has here found as a fact that the circumstances of the finding of the relevant documents establish that those documents had been discarded by the parties, and thrown away as being of no further use. There was evidence upon which he could come to that finding.

Now, the only other matters left are the documents, exhibits B and C, which have been described as clues. Exhibit C contains certain dates, and an examination of those dates discloses *prima facie* (which is uncontradicted of course, and later may well be contradicted) that they have relation to the conduct of a lottery between the 11th of April and the 20th of May.

The learned Deputy Legal Adviser says that an application of the provisions of section 114 of the Evidence Enactment establishes a course of conduct on the part of the respondent, and one is to assume that, if he conducted a lottery on the 20th of May, he has conducted one on the 21st of May.

In my opinion that is wrong. There is no such presumption to support a criminal prosecution—one is not entitled to presume that, if a man commits an offence today, he will necessarily commit it again tomorrow.

I apprehend the elementary principle of criminal law is that the prosecution should prove their case. They charged the respondent with having committed an offence on the 21st May and not on the 20th May.

The learned Magistrate held on the facts that no offence was shown to have been committed on the 21st May. For these reasons I think the decision of the Magistrate was right, and the first ground of appeal fails.

But then says the appellant that section 171 of the Criminal Procedure Code provides that in such circumstances it is the duty of the Court to consider the evidence, and if it is satisfied on certain matters, and if necessary, to amend the charge.

I agree; the learned Magistrate seems to have applied himself solely to the first question, and omitted to consider section 171. It is clear that, if Exhibit C establishes a preparation for the running of a lottery up to and including the 20th of May only and not on the 21st, it does suggest that on the 20th May there was on the part of the possessor of that document preparation to conduct a lottery.

It seems to me that the Magistrate should have altered the charge, and gone on and heard the case on its merits. This he did not do. I think the proper course will be to reverse his order, and remit the case to the First Magistrate for hearing on such charge as the prosecution may deem fit to prefer against the respondent.

Appeal allowed.